Supreme Court of the United States

October Term, 1939.
No. 394

STATE OF MINNESOTA EX REL CHARLES EDWIN PEARSON,
Appellant,

vs.

PROBATE COURT OF RAMSEY COUNTY, MINNESOTA, AND HON. MICHAEL F. KINKEAD, JUDGE OF SAID PROBATE COURT OF RAMSEY COUNTY,
Respondents.

APPELLANT'S BRIEF.

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APPELLANT'S BRIEF.

REFERENCE TO OFFICIAL REPORT.

The opinion of the Supreme Court of Minnesota is officially reported in 205 Minn. 545. It also appears in 287 N. W. 297.

CONCISE STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED.

This was an original proceeding in the Supreme Court of Minnesota. In his petition appellant directly attacked Chapter 369, Laws of 1939, as being unconstitutional because it denied to appellant due process of law and the equal protection of the laws and abridged the privileges and immunities of citizens of the United States, all in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States. (Record, pp. 1, 2, f. 2, 3). These contentions were never waived or withdrawn. (Record, p. 15, f. 57).

The Supreme Court of Minnesota, by its decision and judgment having sustained the validity of the statute, appellant is given a direct right of appeal under Section 237 of the Judicial Code as amended. (U. S. C. A. Title 28, Section 344).

STATEMENT OF THE CASE.

On April 19, 1939, the Minnesota Legislature passed Chapter 369, Laws of 1939. It was approved April 21, 1939, and reads as follows:

CHAPTER 369—H. F. No. 1584.

A BILL.

FOR AN ACT relating to persons having a psychopatic personality.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. The term "psychopathic personality" as used in this act means the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or a combination of any such conditions, as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons.

Sec. 2. Except as otherwise herein or hereafter provided, all laws now in force or hereafter enacted relating to insane persons, to persons alleged to be insane, and to persons found to be insane, shall apply with like force and effect to persons having a psychopathic personality, to persons alleged to have such personality, and to persons found to have such personality, respectively. Provided however, before such proceedings are instituted, the facts shall first be submitted to the county attorney, who, if he is satisfied that good cause exists therefor, shall prepare the petition to be executed by a person having knowledge of the facts, and shall file the same with the judge of the probate court of the county in which the "patient," as defined in such statutes, has his settlement or is present. The judge of probate shall set the matter down for hearing and for examination of the "patient." The judge may at his discretion exclude the general public from attendance at such hearing. The "patient" may be represented by counsel; and if the court determines that he is financially unable to obtain counsel, the court may appoint counsel for him. The "patient" shall be entitled to have subpoenas issued out of said court to compel the attendance of witnesses in his behalf. The court shall appoint two duly licensed doctors of medicine to assist in

the examination of the "patient." The proceedings had shall be reduced to writing and shall become part of the records of said court. From a finding made by such court of the existence of psychopathic personality, the "patient" may appeal to the district court upon compliance with the provisions of the 1938 Supplement to Mason's Minnesota Statutes of 1927, Sections 8992-166, 8992-167, 8992-169, 8992-170.

Sec. 3. The existence in any person of a condition of psychopathic personality shall not in any case constitute a defense to a charge of crime, nor relieve such person from liability to be tried upon a criminal charge, unless such person is in a condition of insanity, idiocy, imbecility, or lunacy within the meaning of the laws relating to crimes and criminal procedure.

Sec. 4. All acts and parts of acts inconsistent herewith are hereby repealed.

Approved April 21, 1939.

Proceedings under this act were instituted against appellant by the filing of a petition with the probate judge on April 28, 1939. A hearing upon such petition was set for May 5, 1939, at 2 o'clock P. M. (Record, p. 1, 3, f. 1, 5). The petition alleged that the petitioner believed that appellant was a psychopathic personality as defined in Chapter 369 "because of his emotional instability, impulsiveness of behavior, lack of customary standards of good judgment, failure to appreciate the consequences of his acts as to render said Charles Edwin Pearson irresponsible for his conduct with respect to his sexual behavior." (Record, pp. 4, 5, f. 6.). A warrant was issued for appellant's arrest and was about to be served on the

morning of May 5, 1939. (Record, p. 1, f. 1.) On May 5, 1939, appellant filed in the Supreme Court of Minnesota his petition for a writ of prohibition. This petition appears in the printed record, pages 1 to 3. An order allowing the writ was made by the Supreme Court on May 5, 1939, (Record, p. 6, f. 8), and an alternative writ of prohibition requiring the Probate Court and the judge thereof to desist and refrain from further proceedings until the further order of the court, and to show cause why the restraint should not be made absolute, was issued on May 5, 1939. The alternative writ was duly served upon the Probate Court and the judge thereof. (R. pp. 6 to 8, f. 9 to 18.) There was a return to the alternative writ admitting the allegations of appellant's petition except that the return did not admit that the act was unconstitutional but, on the contrary, claimed that the proceedings were authorized under the act and that the Probate Court obtained jurisdiction by reason thereof. (Record pp. 8 to 10, f. 17 to 26.)

The questions presented were briefed and argued, and the court held the act constitutional in an opinion filed June 30, 1939. This opinion is set out in the printed record on pages 17 to 28. The great bulk of this opinion is taken up with a discussion of the sufficiency of the title of the act and a discussion of the jurisdiction of the Probate Court. The only federal question discussed in the opinion is the question of whether the act is so indefinite and uncertain as to be void, and in that discussion most of the points raised by appellant were passed over without comment. The latter portion of the opinion deals with the question of whether appellant was entitled to a jury trial, and the court held that the proceedings were

not of criminal character and consequently, that under the constitution and laws of Minnesota, there was no right to a jury trial. We assume that the court's decision upon that point is conclusive here.

Practically every point raised by the appellant and presented in this brief was disposed of by the brief statement at the close of the opinion, reading:

> "We conclude that the act is constitutional both in form and in application." (Record, p. 28.)

A petition for re-hearing was denied without additional opinion, and final judgment was entered quashing the writ of prohibition and vacating the restraining order on August 31, 1939. (Record, pp. 28, 29, f. 75).

Within the time allowed by law, appellant filed his petition for appeal and the Supreme Court entered an order allowing the appeal on September 6, 1939, (Record, pp. 12, 13 f. 29, 30) and this appeal was promptly and duly effected. On November 6, 1939, this court entered its order noting probable jurisdiction.

After the appeal was perfected, Judge Pearson was succeeded as Probate Judge by the Hon. Michael F. Kinkead who was substituted as respondent by order of this court entered Nov. 6, 1939.

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED.

Appellant relies upon and urges errors duly assigned by him as follows:

(1) The Supreme Court of Minnesota erred in holding that Chapter 369, Laws of 1939, was not repugnant to the Constitution of the United States, and in holding and deciding that it was not too vague, indefinite and uncertain to constitute due process of law within the meaning of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and erred in refusing to hold and decide that said Chapter 369 was too vague, indefinite and uncertain to constitute valid legislation under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

(2) The Supreme Court of Minnesota erred in holding that said Chapter 369, Laws of 1939, did not deny appellant the equal protection of the laws guaranteed to him by Section 1 of the Fourteenth Amendment to the Constitution of the United States, and in refusing to hold and decide that said Chapter 369 violated the Fourteenth Amendment to the Constitution of the United States in that it is not made applicable to all of the class treated of, but on the contrary exempts many of said class from its provisions.

(3) The Supreme Court of Minnesota erred in holding that said Chapter 369, Laws of 1939, did not deny to appellant the due process of law that is guaranteed to him by Sec-

tion 1 of the Fourteenth Amendment to the Constitution of the United States, and in refusing to hold and decide that said Chapter 369 contained no provisions safeguarding and protecting human rights and securing to appellant and others rights and liberties guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States, and in refusing to hold and decide that said Chapter 369 was so arbitrary, unfair and wanting in reason as to violate established principles of private right and distributive justice that the Constitution of the United States, and particularly Section 1 of the Fourteenth Amendment thereof, was designed to secure to all.

(4) That said Chapter 369, Laws of 1939, is so arbitrary, unusual and cruel in its provisions, and so lacking in any provision for the protection of human rights and liberties as to offend the good sense of mankind and all the principles of right and justice and is void because repugnant to the due process of law guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States, and the Supreme Court of Minnesota erred in holding that it was not repugnant to the Fourteenth Amendment, and in refusing to hold that it was void because repugnant to the Fourteenth Amendment for the reasons here stated.

(5) The Supreme Court of Minnesota erred in holding and deciding that Chapter 369, Laws of 1939, did not abridge the privileges and immunities of citizens or of this appellant, as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

SUMMARY OF THE ARGUMENT.

A brief summary of appellant's argument is as follows:

Chapter 369, Laws of 1939, is void because repugnant to the equal protection clause of Section 1 of the Fourteenth Amendment in that it does not embrace all members of the class that the act deals with.

Chapter 369 is void because repugnant to the due process clause of Section 1 of the Fourteenth Amendment, first, because it is too vague, uncertain and indefinite to constitute valid legislation and, second, because it is so arbitrary, unfair, oppressive, capricious and unreasonable and so lacking in any safeguards for the security of private rights as to be void.

Chapter 369 is also void because it abridges the privileges and immunities of citizens of the United States as set forth in the argument following.

ARGUMENT.

Legislative History of Chapter 369, Laws of 1939.

In Minnesota, courts take judicial notice of the journals of the legislature and of the legislative history of bills. *Dunnell's Minnesota Digest*, Section 8963.

Chapter 369 was introduced as House File No. 1584 on April 5, 1939. That it received scant consideration is shown by the fact that it was passed a few days later and sent to the Senate, where it was passed, after amendment, on April 18, 1939. The last day of the session was April 19, 1939.

When the act was introduced, the Journal of the House, on page 1477, gave its title as:

> "A bill for an act relating to persons having a psycopatric [sic] personality."

Its author, evidently entertaining a well-grounded fear that the bill was an open invitation to the modern equivalent of Salem witch hunts, added a proviso to section one reading:

> "provided, that political or religious belief or activity, racial origin, or behavior occurring in connection with a labor dispute or a strike shall not in any case be considered as a basis for a finding of psychopathic personality."

This proviso was dropped when the bill was amended in the Senate.

On the day that the bill was passed (Journal of Senate for April 18, 1939, page 68) the Senate frankly confessed its ignorance of the subject upon which it was legislating by adopting a resolution asking that a committee be appointed by the State Medical Association and the State Bar Association to make a study of psychopathic personalities and report in time for action at the 1941 legislative session.

A General Consideration of Psychopathic Personalities.

Chapter 369 is entitled: "An act relating to persons having a psychopathic personality." Before coming to the legal questions presented, and for the purpose of providing an appropriate background, it may be helpful to consider briefly the general subject of psychopathic per-

sonalities. The authorities differ as to the number of types of such psychopathic personalities but are all agreed that some of the types are capable of subdivision and this may account for the difference in the number of types listed in different works on the subject. Some authorities list five types of psychopathic personalities, others, seven; and still others up to twelve or more. Reference might be made to Sadler's "The Theory and Practice of Psychiatry," (1936), Strecker-Ebaugh's "Clinical Psychiatry (4th Ed.)" and Maloy's "Nervous and Mental Diseases."

One of the types of psychopathic personalities is the criminal type and this type falls naturally into two main classes. First, criminal psychopathics who are normal sexually but because of their irresponsible proclivities are prone to commit anti-social acts or crimes, and, second, criminal sexual psychopathics who are irresponsible sexually although they may be perfectly rational and well-balanced in every other respect.

In all types of psychopathic personalities the irresponsibility falls short of insanity or feeblemindedness. It is true that in some of the members of each type the disease or disorder may make such pronounced progress as to lead to insanity. In such cases those so afflicted step out of the psychopathic personality class into the class of the definitely insane, and become subject to the laws dealing with the insane.

Chapter 369 deals with sane, criminal, sexual psychopathics. In Section 1 the definition of "psychopathic personalities" is limited strictly to those persons who, because of the existence of one or more of four enumerated "conditions," are rendered irresponsible for their conduct

"with respect to sexual matters and thereby dangerous to other persons."

Generally recognized as the best work on sexual psychopathic personalities is Kraft-Ebing on "Psychopathia Sexualis." The text of this book to which we have access is the revised edition of the 12th German edition. Other works dealing with psychopathic personalities are Bloch's "The Sexual Life of our Time," and Huhner's "Disorders of the Sexual Function." Instructive articles in medical and legal journals are numerous. A report now on our desk lists 67 recent articles. Some of these are mentioned in the notes to the article on "Validity of Sex Offender Acts" in the February 1939 issue of the Michigan Law Review (Vol. 37, page 613) and the article on "Civil Commitment for Psychiatric Treatment" in the March 1939 issue of the Columbia Law Review (Vol. 39, page 535). Other articles not dealing solely with sexual psychopathics but throwing light on the whole problem are "Mental Abnormality in Relation to Crime" in the March-April 1939 issue of the American Journal of Medical Jurisprudence and "Psychopathic Personalities as a Household Problem" in the June 1938 issue of California and Western Medicine (Vol. 48, No. 6, page 421).

An examination of these authorities demonstrates:

1. That the sexual type of psychopathic personalities includes men afflicted with satyriasis, women afflicted with nymphomania, homosexuals, sadists, fetishists, sodomites, exhibitionists and many others.

2. That the "conditions" referred to in Section 1 of Chapter 369—"emotional instability," "impulsiveness of

behavior," "lack of customary standards of good judgment" and "failure to appreciate the consequences of his act"—are not *causes* of sexual irresponsibility but are merely symptoms or results of certain diseases or disorders.[1]

3. That the "conditions" referred to in this section 1 of the act are the symptoms commonly present in the case of psychopathic personalities other than those of the sexually irresponsible type. The sexually irresponsible type of psychopathic personalities usually present entirely different symptoms and results. In most of such cases the only symptom is an abnormal sexual appetite.

It is apparent, and the provisions of the act demonstrate, the the members of the legislature had little knowledge of psychopathic personalities at the time this act was passed. This is not said in criticism as psychiatrists themselves are still wandering in a fog. That the legislators frankly conceded their ignorance and need for information is shown by the Journal of the Senate for April 18, 1939, on page 68, where appears a resolution passed by the Senate asking that a committee be appointed by the Minnesota State Medical Association and the Minnesota State Bar Association "to make a study of the subject of psychopathic personalities" and report to the Governor and the Senate with their recommendations at the beginning of the legislative session in 1941.

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[1] In the act these so-called "conditions" are treated as causes as it provides that they are to be such as "to render" the persons to whom the act applies irresponsible sexually. Only those of the irresponsible sexually whose disorder is traceable to one or more of these conditions are embraced within the act. The fact is, as we point out later, that these "conditions" are not causes but merely symptoms or results of certain disorders.

The value of such a preliminary study and report by experts, as was contemplated by the above mentioned resolution, is apparent from a comparison of Chapter 369 with the Illinois act dealing with sexual psychopathics approved July 6th, 1938, and found in Jones Illinois Annotated Statutes, Section 37.665 (4). Before the Illinois legislature acted a committee of expert neurologists and psychiatrists was appointed by the Honorable Thomas J. Courtney, State's Attorney for Cook County. This committee made an exhaustive study of psychopathic personalities and filed a written report. That report supports in all things what we have said above. For instance, in opposition to the general impression that homosexuals are harmless, the committee, on page 4 of this report said:

> "When by mutual consent homosexual practices are indulged in privacy no injury to society may result, but if they are imposed upon children, exhibited, or lead to seduction, society is in danger."

That the symptoms enumerated in Section 1 of Chapter 369 as causes are not necessarily present in sexual psychopathics and that the only symptom in many of such cases is evidence of an abnormal sexual appetite is shown on page 10 of this report as follows:

> "The sexual psychopath is typically not feeble-minded, indeed, he may have outstanding intelligence, he is not, according to present conceptions, insane nor has he any other demonstrable neurologic and may not have other psychiatric disorder. What he has is an imperative uncontrollable drive towards abnormal sexual expression, *and this may be practically his only*

symptom. Aside from this symptom he may be capable and often succeeds in making a satisfactory and even superior social adjustment." (Italics ours.)

On page 16 this committee warned that:

"Great care must be exercised in formulating the legal definition so that it does not introduce a term leading to misinterpretation and confusion * * *."

For the purpose of discovery of the disorder and proper treatment thereafter the committee recommended (page 16) "Reference to a psychiatric clinic attached to a court," trial by jury and subsequent discharge upon cure based on the opinion of "a proper body of psychiatrists." The committee also recommended (page 17) that those afflicted be committed "to a proper psychopathic hospital or State institution."

The committee (pages 18-19) suggested that criminal psychopathics be divided into two classes and furnished a definition of both such classes and recommended the use of such definitions in any proposed legislation. The first definition embraced criminal psychopathics who were normal sexually. The second embraced sexual psychopathics and reads:

"All persons not insane or feebleminded suffering from a mental disorder, which has existed for many years or from childhood and which mental disorder is coupled with strong, vicious and criminal propensities toward the commission of sex offenses, and upon which criminal propensities punishment has had little or no deterrent effect, shall be deemed and are hereby declared to be criminal sex psychopaths."

An examination of section 1 of the Illinois Act of July 6, 1938, discloses that the legislature adopted, almost verbatim, the definition of sexual psychopaths recommended by the committee. It also made the act applicable to *all* of the class.

We are informed that this report has not been published. Copies of it may be obtained from the States' Attorney of Cook County, Chicago, Illinois.

The numerous reports and articles on the subject demonstrate quite clearly that there has been no recent increase in sex offenses and that, as stated in the article in 37 Mich. L. Rev. 613; "Any apparent increase may be explained by publicity." They also bring out the existing confusion on the subject amongst psychiatrists and others—a confusion that fully justifies the report of the Committee on Psychiatric Jurisprudence (a joint committee representing the American Bar Association, the American Medical Association, the American Psychiatric Association and the American Neurological Association) who reported to the American Bar Association at its 1938 meeting that:

> "It was thought premature to urge such a law until there is a more substantial agreement on the part of medical men and psychiatrists as to the definition of the term 'Psychopathic Personality.'"

The above quotation may be found in the October 1938 issue of the American Journal of Medical Jurisprudence.

Chapter 369 is Void Because it Denies the Equal Protection of the Laws Guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

We concede the right to classify and assume for present purposes that there is no objection to the classification adopted by the act, but, having adopted a classification, it is our contention that *all* persons within the class must be treated alike or the act is void as denying the equal protection of the laws guaranteed by the Fourteenth Amendment.

Mr. Cooley states that the constitution *requires*:

> "that *all* persons subject to such legislation shall be treated alike." (Italics ours.)
>
> *Cooley's Constitutional Limitations* (8th ed.) pages 824, 825.

In equally terse phrases Mr. Cooley states what the constitution *permits*:

> "It is not infringed by legislation which applies only to those persons falling within a specified class, *if it applies alike to all persons within such class.*" (Italics ours.)
>
> *Cooley's Constitutional Limitations,* (8th ed.) page 825.

That the act is an exercise of the police power and designed for the protection of the public makes no difference in the rules applicable. Such statutes, like all other statutes, are subject to the due process and equal protection clauses of the Fourteenth Amendment:

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 22 S. Ct. 431.

Atchison Co. v. Vosburg, 238 U. S. 56, 35 S. Ct. 675.

So. Ry Co. v. Virginia ex rel Shirley, 290 U. S. 190, 54 S. Ct. 148.

Panhandle Co. v. State Highway Com., 294 U. S. 613, 55 S. Ct. 563.

The classification adopted by Chapter 369 is set out in section one which reads as follows:

> "Section 1. Definition.—The term 'psychopathic personality' as used in this act means the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or a combination of any such conditions, as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons."

Clearly the "class" dealt with by the act is composed of persons irresponsible for their conduct with respect to sexual matters and thereby dangerous to other persons. Equally clear is the fact that the act does not embrace *all* such irresponsible persons. By express provisions of the act only a *part* of the class of irresponsible persons dealt with are included. To include all of such class it was only necessary that the legislature make the act applicable to *all* such irresponsible persons. The act does not do that but on the contrary is made applicable to only those of the class whose condition of irresponsibility is directly traceable to certain enumerated conditions. Those conditions are "emotional instability," "impulsiveness of behavior," "lack

of customary standards of good judgment" and "failure to appreciate the consequences of his act." The act selects from the "irresponsible sexually" those, and those only, in which "the existence" "of *such* conditions" "or a combination of any *such* conditions" is such "*as to render*" the person irresponsible. Those whose irresponsibility sexually is traceable to *other,* rather than *such,* conditions are expressly excluded by the act, although members of the class dealt with.

The class dealt with is not composed of persons who are emotional, impulsive, lacking in good judgment or who fail to appreciate the consequences of their acts. Those qualities are mentioned for the purpose of limiting the number of the class of irresponsible persons to whom the act is to be applicable, by requiring proof, not alone of irresponsibility sexually, but proof also that such condition of irresponsibility is traceable directly to the existence of one or more of the qualities mentioned.

Conclusive proof that a person is irresponsible sexually and thereby dangerous to other persons makes out no case under the act. The proof must go further and show that such irresponsibility is due to one or more of the qualities mentioned. This demonstrates that the act does not embrace all of the class that it deals with. The provisions of the act would exclude from its operation most men suffering with satyriasis, most women afflicted with nymphomania, as well as most homosexuals, fetishists, exhibitionists, sadists and others. That even homosexuals may be dangerous is recognized. In an article on "Civil Commitment for Psychiatric Treatment" appearing in 39 Columbia Law Review 534, 538, the author says:

"* * * even the homosexual may be dangerous in that he may debauch the young or attack in jealousy."

As a matter of fact the act excludes most members of the class that it deals with for it would only be in a limited number of the class that the precedent causes listed in the act—emotional instability, impulsiveness, lack of good judgment, or failure to appreciate consequences—would be the *cause* of the irresponsibility. In the great bulk of the class, those conditions, if present, would be the *result* and not the cause of the irresponsibility. Under this act the conditions mentioned must be the *cause,* the act stating that it is to apply where "the existence in any person of *such* conditions of (instability, impulsiveness, etc.,) or a combination of *such* conditions *as to render* such person" irresponsible sexually. For instance, a woman afflicted with nymphomania might be mentally irresponsible sexually and thereby dangerous to other persons, and the *cause* of her condition be some disease of the clitoris. Here clearly none of the precedent conditions mentioned in the act could be such "as to render" her irresponsible, or account for her irresponsibility. Granting their existence in her, they would be (assuming a connection between such symptoms and her disorder) the *result* and not the *cause* of the irresponsibility—the cause being the disease mentioned. The same illustration holds good as to most men afflicted with satyriasis. All, however, come within the class dealt with. They might all be mentally irresponsible sexually, but the *cause* of their condition would not be any one or more of the precedent conditions specified. Such conditions, assuming a connection between them and the disorder, would only be the *results* of the cause. So far as

such precedent conditions are concerned the act by express provision makes them causes, and not results flowing from or symptoms due to other causes.[2]

Whatever the cause of their condition may be, those who are irresponsible sexually and thereby dangerous to others constitute one class. As to each member of that class the fact of danger to others is identical, though the type of danger may differ. Assuming a need for restraint that need is identical as to each member of the class, and the need of treatment is identical as to each member, although the type of treatment may differ. When the condition, danger, necessity for restraint and need of treatment is identical as to each member of the class there is no basis for a subdivision of the class based on difference in the treatment that psychiatrists might prescribe, or based on causes for the condition—both of which could only be determined after careful examination by a qualified psychiatrist. Five or ten months from now the medical profession will change their position, both as to causes and treatment, and any act based thereon would soon be obsolete.

In what we have said above, we are not suggesting *other* instances to which the act might be made applicable, but instances *in the same class.* To the legislature and to the public generally the *cause* of the irresponsibility is immaterial, and it is important to the psychiatrist only as influencing the method of treatment. The important thing,

[2]In the article dealing with sex offenders in connection with "Civil Commitment for Psychiatric Treatment," appearing in the March, 1939, issue of the Columbia Law Review (Vol. 37, page 534), the author states that characteristics; such as, "emotional instability, lack of response to social standards and general lack of control" are "universally accepted as symptomatic." In other words such characteristics are not causes which may render a person irresponsible, but symptoms from which deductions may be drawn as to causes.

the thing which justifies classification, is irresponsibility. The hundred and one things which may cause the irresponsibility, while important to psychiatrists in deciding on the method of treatment, are of no importance to others and form no basis for subdividing the class. Otherwise we might have a hundred laws based on different causes but all dealing with one class.

The court must take the act as it stands. As said by the court in *Alexander v. Minnis*, 129 Minn. 165:

> "judicial interpretation cannot be allowed to usurp the place of legislative enactment."

and in *Mayflower Farms v. Ten Eyck*, 297 U. S. 266, 56 S. Ct. 457, in holding void a statute of New York because it did not embrace within its provisions all independent dealers going into business after its passage, this court said that, in the absence of any showing justifying the exclusion:

> "we have no right to conjure up possible situations which might justify the discrimination. The classification is arbitrary and unreasonable and denies the appellant the equal protection of the law."

The choice of words or omission of words cannot be considered accidental or be disregarded. It is significant that in this act the legislature made "*all* laws" relating to insane persons applicable to persons irresponsible sexually, but omits "all" when it comes to describing the sexually irresponsible persons who are to come within the terms of the act. In *Williams v. United States*, 289 U. S. 553, 53 S. Ct. 751, this court said:

> "The use of the word 'all' in some cases, and its omission in others, cannot be regarded as accidental."

See also:

Wright v. United States, 302 U. S. 583, 58 S. Ct. 395.

Where a law is stringent in its provisions, as is the law under consideration, this court, in *Yu Cong Eng v. Trinidad,* 271 U. S. 500, 46 S. Ct. 619, said that it should not be treated as "a nose of wax, to be changed from that which the plain language imports" in order to save it. In other words if a law is not valid on its face, the courts cannot amend it.

The Minnesota decisions are unanimous in holding that all members of a class embraced in any act of the legislature must be treated alike or the act is void;

State v. Pocock, 161 Minn. 376.

Johnson v. St. Paul Co., 43 Minn. 222.

State v. Sheriff of Ramsey County, 48 Minn. 236.

State v. Luscher, 157 Minn. 192.

State ex rel. v. Wagener, 69 Minn. 206.

Mathison v. Mpls. St. Ry. Co., 126 Minn. 286.

On the question of the difference that will justify exclusion from a class, the Minnesota case of *State v. Pehrson,* 287 N. W. 313, decided July 7, 1939, is particularly enlightening. The act there involved was an ordinance of the City of Minneapolis which required peddlers of farm products to be licensed. It exempted those peddling the products of farms occupied and cultivated by them. It was claimed that the ordinance was void because it did not embrace *all* peddlers. The city urged that there was a difference sufficient to justify the exclusion because an amendment to the state constitution provided:

> "Any person may sell or peddle the products of the farm or garden occupied and cultivated by him without obtaining a license therefor."
> *Minn. Const.* Art. 1, Sec. 18.

The court held that the amendment to the constitution did not create a difference sufficient to justify the exclusion and that the ordinance was arbitrary, unreasonable and void because violating the equal protection clause of the Fourteenth Amendment, saying:

> "The decisions of this court which have been mentioned above are controlling precedents for the proposition that a distinction between those who grow and those who do not grow the product which they sell is, when the purpose of the ordinance is to regulate selling from house to house, unreasonable and arbitrary. No reasons have been advanced which would justify us in abandoning the holding of these early cases. Since the classification is unreasonable, the ordinance is violative of the 14th amendment to the federal constitution."

The decisions of this court are equally clear and emphatic in holding that any act of the legislature which does not embrace within its provisions all of the class dealt with is arbitrary and void because it denies the equal protection of the laws guaranteed by the Fourteenth Amendment. We cite a few of the cases:

Hartford Co. v. Harrison, 301 U. S. 459, 57 S. Ct. 838.

Gulf C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150, 17 S. Ct. 255.

Southern Ry. Co. v. Greene, 216 U. S. 400, 30 S. Ct. 287.

Royster Guano Co. v. Commonwealth of Virginia, 253 U. S. 412, 40 S. Ct. 560.

Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32, 48 S. Ct. 423.

Colgate v. Harvey, 296 U. S. 404, 56 S. Ct. 252.

Duncan v. Missouri, 152 U. S. 377, 14 S. Ct. 570.

Yick Wo. v. Hopkins, 118 U. S. 356.

The courts will indulge a presumption of good faith and knowledge on the part of legislatures of existing conditions, but to carry such presumptions too far "is to make the protecting clauses of the fourteenth amendment a mere rope of sand, in no manner restraining state action." The words just quoted are from the decision in *Gulf etc. Co. v. Ellis*, supra, where this court said:

> "No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

That the deviation from constitutional requirements might by some be considered slight is not sufficient to save the act. The motto of the courts is obsta principiis. As was said by this court in *Boyd v. United States*, 116 U. S. 616, 635, 6 S. Ct. 524, 535:

> "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rules that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any

stealthy encroachments thereon. Their motto should be obsta principiis."

Those words are particularly applicable here if it should be argued that the act in question involves most of the class dealt with, and should therefore be upheld. Just how many irresponsibles are exempted by the express provisions of the act can never be known and is not important on the question of whether the act is constitutional, for, if there are *any* of the class that the act does not include, *however small in number*, then the act is void.[3] See on this point *Truax v. Corrigan*, 257 U. S. 312, 42 S. Ct. 124, where this is pointed out in these words:

> "Thus the guaranty was intended to secure equality of protection not only for *all* but against *all* similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class *however limited*, having the effect to deprive another class *however limited*, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class." (Italics ours.)

In *Louisville etc. Co. v. Coleman*, supra, this court said that "mere difference is not enough." There must be such a real and substantial difference as to clearly justify the exclusion of a part of the class dealt with. Here *all* of the class are alike in condition—irresponsible sexually—and

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[3]For the purpose of the argument we have assumed that some of the class dealt with are embraced within the provisions of the act, although it is difficult to conceive of symptoms rendering any one irresponsible. Irresponsibility is caused by mental or physical disorders. Symptoms of such disorders are important only in that they aid experts in determining causes.

they are all alike in harmful result—dangerous to other persons. The only difference between those embraced in the act and those excluded is as to the *cause* of the condition—something that is important only to the psychiatrist in treating each afflicted individual. The *cause* might result in 100 different methods of treatment in the case of 100 persons, but it would be ridiculous to say that such fact justified 100 separate acts of the legislature classifying irresponsibles according to the cause of their irresponsibility.

In practically all the cases in which this court has upheld laws against the objection that they were repugnant to the equal protection clause of the Fourteenth Amendment, examination will disclose that the laws embraced *all* of the class dealt with. In those few cases where a different view was taken it will be found that the decision is based upon a substantial difference which justified or compelled the distinction. Illustrative of this class of cases is *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 31 S. Ct. 337, which involved the constitutionality of a New York statute designed to safeguard natural mineral springs against waste and impairment. In the act a distinction was made between pumping from wells penetrating porous rock and pumping from wells which did not penetrate such rock. This distinction was based on *a substantial difference in harmful results* and the court held that such difference furnished a reasonable basis for the classification.

In the case at bar there is no difference, substantial or otherwise, between those included in the act and those excluded from it. Both the persons included and those excluded are "irresponsible sexually," so there is no difference in the condition of the members of the class that the act deals with. Neither is there any difference in harmful re-

sults, as both those included and those excluded are "dangerous to other persons." The sole and only difference between those included and those excluded is as to the cause of their condition, and that is something that only a psychiatrist would be interested in and could determine, and he would only be interested in such determination because it would aid him in treating the condition.

That the "class" dealt with in this act are the sexually irresponsible must be conceded. The lower court's opinion in several places so states. Equally obvious is the fact that some of the class dealt with are exempted from the provisions of the act. Under all the decisions this fact renders the act repugnant to the guarantee of the equal protection clause of the Fourteenth Amendment.

CHAPTER 369 IS VOID AS IT IS REPUGNANT TO THE DUE PROCESS OF LAW CLAUSE OF SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

(a) *The Act is too Vague, Indefinite and Uncertain to Constitute Valid Legislation.*

Civil legislation comes within the rule that statutes violate the due process clause of the Fourteenth Amendment when they are so vague, indefinite and uncertain that men of common intelligence must guess at their meaning and differ as to their application.

A. B. Small Co. v. American Sugar Refining Co., 267 U. S. 233, 45 S. Ct. 295.

Cline v. Frink Dairy Co., 274 U. S. 445, 47 S. Ct. 681.

Parks v. Libbey-Owens Co., 360 Ill. 130, 195 N. E. 616, 21 Mich. Law Rev. 843.

The only difference in the application of the rule, as between civil and criminal legislation, is that criminal legislation is given closer scrutiny, as human liberties and reputations are involved. The reason for the closer scrutiny exists here, and Chapter 369 should receive the same careful examination that it would receive if it were definitely labeled as criminal legislation.

Under this act a warrant is issued and the accused arrested and placed in confinement exactly as in proceedings under a criminal statute. Under most criminal statutes the accused may be released on bail. This act is more stringent in that the accused has no such right. Under most criminal statutes the accused on a finding of guilt is subject to fine or imprisonment for a definite and frequently short term of days or years. Under this act upon conviction there can be no fine and no definite term short of a life sentence. The court is required to commit the accused for the rest of his life to an asylum for the dangerously insane.

A still stronger reason why this act should be subjected to even closer scrutiny than the ordinary criminal statute is the nature of the subject dealt with and the sinister danger to innocent persons through charges made by the hysterical, suspicious or evil-minded. The act, as it now stands, is an open invitation to blackmail. No conviction under this act is necessary to bankrupt a man's business, break up his home and subject him and his wife and children to humiliation, shame and disgrace. All that can be accomplished by the mere filing of charges.

Even a cursory reading of this chapter 369 will convince any impartial reader that men of common intelligence must guess at its meaning and differ as to its application. We will have as many differing guesses as there are county at-

torneys and probate judges, and it is not even required that those who guess be lawyers. Probate judges in Minnesota are not required to be learned in the law and many of them are not lawyers and have had no legal training.

What is meant by "dangerous" in section 1 of the act? Does it refer to physical injury or injury to the mind or morals? And when is any one dangerous? There are some in every community who consider every normal man sexually dangerous. Where is the line to be drawn and who is to draw it? There is no definite standard fixed in the act to insure that the rule to be applied will be the same in every county in the state. What is said here as to "dangerous" is equally true of the word "irresponsible." Section 3 of the act makes it clear that the word was not used as a synonym for insanity. If not insane, just who are "irresponsible?" The act furnishes no guide.

What is meant by "emotional instability?" Is the act so certain and definite that the same rule will be applied to all? The fact is that one who is looked upon by some as emotionally unstable is looked upon by others as stolid and unemotional. There is no uniformity of opinion on such matters and the act furnishes no rule or guide by which uniformity might be attained. Everyone is left free to guess, differ and err.

What is said above as to "emotional instability" is true of the phrase "impulsiveness of behavior." The act furnishes no rule, standard or guide, and there is no settled opinion upon the question of what constitutes impulsiveness of behavior. One whom the probate judge of Pine County might consider impulsive, the probate judge of St. Louis County might consider deliberate. The result would

be that, instead of having one statute applicable to all alike, we would have as many distinctly different statutes being enforced as there are probate judges.

And just when may a man be considered lacking in "customary standards of good judgment?" What are such customary standards? The act establishes no standard and there is no uniform standard throughout the state. Standards of good judgment differ every few miles in every direction. Even in the same city or village they may differ with each group therein and frequently with each individual in a group.

When we come to "failure to appreciate the consequences of his acts" we reach something that, in varying degree, we are all guilty of. Not being omnipotent we all frequently fail to realize the consequences of our acts. Just where is the dividing line to be drawn? The act furnishes no rule or standard by which this can be done.

This Chapter 369 falls within the class of legislation condemned in *Fairmount Creamery Co. v. Minnesota*, 274 U. S. 1, 47 S. Ct. 506, where the court quotes approvingly from *Tyson & Bro. v. Banton*, 273 U. S. 418, 47 S. Ct. 426, as follows:

> "It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody, upon the chance that, while the innocent will surely be entangled in its meshes, some wrong-doers also may be caught."

The validity of the statute is to be determined from its face, without aid of charges filed thereunder. As tersely stated in *United States v. Capitol Co.*, 34 App. Cas. (D. C.) 592:

"The information cannot rise higher than its source,—the statute."

In *United States v. Ninety-nine Diamonds*, 139 Fed. 961, (C. C. A. 8th Cir.) 2 L. R. A. (N. S.) 185, Judge Sanborn, citing as authority therefor the opinion of Chief Justice Marshall in *United States v. Wiltberger*, 5 Wheat. 76, 96, 5 L. ed. 37, 42, said:

"It is the intention expressed in the statute, and that alone, to which the courts may give effect. They may not assume or presume purposes and intentions that the terms of the statute do not indicate, and then enact or expunge provisions to accomplish these supposed intentions."

The Supreme Court of Minnesota has spoken in equally emphatic terms. We quote from the opinion in *Alexander v. McInnis*, 129 Minn. 165, as follows:

"It is true, as stated in State v. Reussing, 110 Minn. 472, [illegible] N. W. 279, that a statute is not valid unless there is a competent expression of legislative will and that *judicial interpretation cannot be allowed to usurp the place of legislative enactment.*" (Italics ours.)

And it was so held by this court in *Lanzetta v. State*,—— U. S.——, 59 S. Ct. 618, where the court says:

"If *on its face* the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. Cf. United States v. Reese, 92 U. S. 214, 221, 23 L. ed. 563; Czarra v. Board of Medical Supervisors, 25 App. D. C. 443, 453. *It is the statute*, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. See Strom-

berg v. California, 283 U. S. 359, 368, 51 S. Ct. 532, 535, 75 L. Ed. 1117, 73 A. L. R. 1484; Lovell v. Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949." (Italics ours).

In this Lanzetta case this court held a New Jersey statute void as repugnant to the due process clause because too vague, indefinite and uncertain in that the statute itself did not contain any adequate definition of the words "gang" and "gangster," the court saying:

"No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in Connally v. General Const. Co. 269 U. S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322:

"'That the term of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'"

The above quotation clearly sets forth the requirements for valid legislation. Chapter 369 transgresses all of those requirements. Its terms are "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application" and for that reason it "violates the first essential of due process of law."

In *State v. Northwest Co.*, 203 Minn. 438, 281 N. W. 753, an act of the legislature required the "actual cost" of the transportation of farm products to be deducted from the purchase price. The court held that "actual cost" was a term "so vague, indefinite and uncertain as to deny due process of law."

In *State v. Parker*, 183 Minn. 588, an act was held void for uncertainty which used the words "lot" and "rear" in connection with the regulation of buildings.

In *Hafiz v. Midland Co.* (Minn.) 287 N. W. 677, the court said that the phrase, "good condition," was a "vague and indefinite phrase" "likely to be given various meanings."

In the following cases legislation was held void as too vague, indefinite and uncertain because of the words or phrases mentioned:

Current rate of per diem wages, Locality.

Connally v. General Construction Co. 296 U. S. 385, 46 S. Ct. 126.

Unjust or unreasonable.

U. S. v. L. Cohen Grocery Co., 255 U. S. 81, 41 S. Ct. 298.

Reasonable profit.

Cline v. Frink Dairy Co., 274 U. S. 445, 47 S. Ct. 681.

Waste.

Champlin Co. v. Corporation Commission, 286 U. S. 210, 52 S. Ct. 559.

Real value.

Collins v. Ky. 234 U. S. 634, 34 S. Ct. 924.

Market value under fair competition, and under normal market conditions.

International Harvester Co. v. Ky. 234 U. S. 216, 34 S. Ct. 853.

Customary street attire.

People v. O'Gorman, 274 N. Y. 284, 8 N. E. (2d) 862.

Disorderly. Unbecoming conduct.

Griffin v. Smith (Ga.) 193 S. E. 777.

"Loud," "ordinary," "usual," as applied to the human voice.

Ex parte Westellison, 38 Okla. Cr. 207, 259 Pac. 873.

"Narrow-tired" and "broad-tired" in an act dealing with the use of highways by wagons.

Cook v. State, 26 Ind. App. 278, 59 N. E. 489.

Aged.

Hallman v. State, 18 S. W. (2d) 652, 113 Tex. Cr. R. 100.

Reasonable effort.

Ex Parte Taft, 284 Mo. 531, 225 S. W. 457.

Reasonable variations.

U. S. v. Shreveport Co., 46 Fed. (2d) 354.

"Unsuitable" or "improper" scaffolding which will not give "proper protection."

Patten v. Aluminum Castings Co. (Ohio) 136 N. E. 426.

"Suitable provisions" to prevent injury.

Toledo Co. v. Snegowski, 103 Ohio St. 161, 136 N. E. 904.

Mob violence.

Augustine v. State, 41 Tex. Cr. R. 59.

Indecent assault.

State v. Comeaux, 131 La. 930.

Public indecency.

Jennings v. State, 16 Ind. 335.

Injurious to the public morals.

Ex Parte Jackson, 45 Ark. 158.

Inhabited portion of any residence district.

City of St. Paul v. Schleh, 101 Minn. 425.

Occupied mainly for residences.

Wasem v. City of Fargo (N. D.) 190 N. W. 546.

Speculative securities. Legitimate business. Ordinary Course. Gain or advantage.

Groskins v. State, 52 Okl. Cr. 197, 4 Pac. (2d) 117.

"Needlessly" killing an animal.

Canadr v. State, 108 Tex. Cr. R. 147, 300 S. W. 64.

Premises.

Smith v. State, 99 Tex. Cr. R. 114, 268 S. W. 742.

Usual transfer delivery zone.

Ex Parte Schmolke, 199 Cal. 42, 248 Pac. 244.

Liquor.

Ex Parte Bales, 42 Okl. Cr. 28, 274 Pac. 485.

Current rate of wages. Locality.

Christy-Dolph v. Gragg, 59 Fed. (2d) 766.

State v. Jay etc. Co., 39 Ariz. 45, 3 Pac (2d) 983.

The display of any flag, etc. "which is likely to provoke a riot or breach of the peace."

People v. Young, 136 Cal. App. 699, 29 Pac. (2d) 440.

Forbidding shipment of oranges "when frosted to the extent of endangering the reputation of the citrus industry."

Ex Parte Peppers, 209 Pac. 896.

Regular price.

Phillips v. State, 125 S. W. (2d) 585.

Reasonable variations.

Ex Parte Humphrey, 92 Tex. Cr. R. 501, 244 S. W. 822.

Substantially.

Cogdell v. State, 81 Tex. Cr. R. 66, 193 S. W. 675.

"Reasonable" as applied to "devices, means or methods."

Boshuizen v. Thompson Co., 360 Ill. 160, 195 N. E. 625.

Unjust and unreasonable.
R. R. Co. v. R. R. Com. 19 Fed. 679.

Undue preferences.
Tozer v. U. S. 52 Fed. 917.

An approved block system.
R. R. Com. of Ind. v. Grand Trunk Co., 179 Ind. 255.

A sufficient number.
Glendale Coal Co. v. Douglas, 137 N. E. 615.

Equal to or better in quality. Specifications.
Atlanta Refining Co. v. Trumbull, 43 Fed. (2d) 154.

Full report.
James v. City of Cleveland, 28 Ohio App. 178, 162 N. E. 617.

Unprofessional conduct.
Matthews v. Murphy, 23 Ky. L. Rep. 750.

Prevailing rate of wages in the locality.
People v. Coler, 166 N. Y. 1.

Grossly improbable statements.
Hewitt v. Board, 148 Cal. 590.

Drove or droves.
McConvill v. Mayor, 39 N. J. L. 38.

Gambling device.
State v. Mann, 2 Ore. 238.

Without "crowding."

U. S. v. Capitol Co., 34 App. Cas. (D. C.) 592.

Suspicious person.

Stoutenberg v. Frazier, 16 App. Cas. (D. C.) 229.

Unprofessional or dishonorable conduct.

Czarra v. Medical Supervisors, 25 App. Cas. (D. C.) 443.

Prevailing rate of wages.

Mayhew v. Nelson, 346 Ill. 381, 178 N. E. 921.

Reasonable and approved devices, means or methods.

Vallet v. Radium Dial Co., 360 Ill. 407.

Vagueness, indefiniteness and uncertainty is not confined to Section 1 of this Chapter 369. It permeates the entire act, even when read in the light of the decision of our Supreme Court upholding it. That this is true is perhaps best illustrated by an analysis of the act prepared after such decision, by a skilled attorney in the office of the county attorney in the largest county of this state. In this analysis, upon the question of when the act is applicable, he states:

> "The condition of emotional instability must exist by reason of a hereditary (inherited tendencies) and not acquired environmental conditions and manifested by an arrested development of the non-intellectual mental faculties, characterized by infantile reactions to adult situations; without inner emotional conflict, and without loss of contact with reality. Likewise, (b) conditions of impulsiveness of behavior, (c) lack of customary standards of good judgment; (d) failure

> to appreciate the consequences of his acts; and (e) a combination of such conditions must also be manifested with respect to sexual matters by reason of similar conditions. If these factors are not shown to exist, then a hearing under the law, in my opinion, is not warranted."

There are very few county attorneys or probate judges who would agree with the above assuming that it means anything or that they understood it if it had a meaning, and it illustrates perfectly the obvious fact that if this act is upheld we will have as many different acts applied and enforced as there are county attorneys and probate judges in the state.

The author calls attention to the fact that while the law requires the facts to be first submitted to the county attorney, there is no requirement for an investigation by him before the filing of the petition and that if there is such a duty in that respect, it is an inferential one only. He calls attention also to the fact that there is no provision as to the degree of proof required to convict. He thinks, however, that "a degree of proof beyond reasonable doubt" should be required "because man's liberty is at stake," adding:

> "This should be true regardless of the fact that the law does not classify a person having a psychopathic personality as a criminal. State ex rel Pearson, supra."

He thinks that the provision of the act making all laws relating to insane persons applicable to psychopathic personalities is limited "to commitment after adjudication and the treatment to be afforded," although the act expressly provides that all laws relating to the insane shall apply

even to persons who are only "alleged" to be psychopathic personalities. He is of the opinion that the act "does not require an overt act" which construction, in many counties, might lead to conviction upon suspicion. He also is of the opinion that under the law, during vacations or sickness of the probate judge, that court commissioners would have full power and authority to proceed, convict and commit, basing this opinion upon Mason's Supplement, 1938, section 8992-181, which provides:

> "*Commissioner may act.*—Whenever the probate judge is unable to act upon any petition for the commitment of any patient, the court commissioner may act in the place of such judge."

Of the section just quoted he says:

> "The Court Commissioner may act *in place of such judge.* If the Court Commissioner stands in the shoes of the Probate Judge, the fair inference would be that the legislature intended that he should have full authority and assume all the duties of a Probate Judge in respect to the particular case so assigned."

The author's position on this point is undoubtedly correct and it would follow that the question of whether a man should be committed for life to an asylum for the dangerously insane and his home and business be ruined, would in many cases be left in the hands of janitors, barbers, butchers, or other persons without legal training.

As a result of this study of the act and the decision of our Supreme Court upholding it, the author says:

> "The essential features of a psychopathic personality can now be summarized in an inclusive definition as follows:

"The psychopath is one whose personality shows a functional hereditary defect, partially modified by environmental conditions, manifested by an arrested development of the non-intellectual mental facilities, and characterized by infantile reactions to adult situations without inner emotional conflict and without loss of contact with reality.'"

How many county attorneys, probate judges or district courts on appeal will agree with that definition?

Notwithstanding the statement above that a definition can now be given, the author says:

"Practically every psychiatrist has his own idea of what constitutes a psychopathic personality;"

Under Chapter 369, the county attorney is made a grand jury of one. There is no requirement in the law that he investigate; there is no provision for a hearing before this grand jury of one of witnesses on behalf of the accused; unless the statute referred to in the next paragraph is applicable, there is no requirement in the act that the accused be represented by counsel.

Under the blanket incorporation into Chapter 369 of all laws dealing with the insane, there becomes a part of the act our statute which makes it the duty of the county attorney to appear on behalf of any person accused of insanity and take such action as may be necessary to protect his rights, Mason's Minnesota Statutes, Section 8957; 1938 Supplement, 8992-174. In other words, the person who has pre-judged the accused and prepared the petition against him is required to appear in his defense and protect his rights!

No one can know by reading this act who is to make the "finding" that the accused is or is not a psychopathic personality. In Section 2 there is a provision requiring the court to appoint two licensed doctors to assist in the examination. This is followed by a further provision that the proceedings shall be reduced to writing and that the patient may appeal from a finding made by the court of the existence of a psychopathic personality. This, when coupled with and read in the light of Sections 8958 and 8959, Mason's 1927 Statutes, which are made a part of the act by reference, makes it indefinite and uncertain as to just who is to make the finding of the existence of a psychopathic personality. Is it the probate judge, as might be inferred from Section 2, or is it the probate judge and the two licensed doctors, as provided by Sections 8958 and 8959? In those sections the two doctors and the probate judge are called a board of examiners, and Section 8959 provides:

> "When the examination is completed, *the board* shall determine whether or not the person examined is a feebleminded person, an inebriate or an insane person."

This is not changed by the 1935 Probate Code (Chapter 72, Laws 1935), Section 175 thereof providing: "The examiners and the court shall report their findings."

In addition to making all laws relating to the insane a part of the act, section 2 apparently adds a dash of the poor laws when it provides that the petition shall be filed with the probate court:

> "of the county in which the 'patient,' *as defined in such statutes*, has his settlement or is present."

What statutes are referred to in the above quotation? No one knows. Certainly not Chapter 369, although section one defines who are to be considered psychopathic personalities. The word "settlement" would indicate that the poor laws were to be considered, to some extent at least, a part of this act.

In conclusion under this head, we very earnestly insist that Chapter 369 is altogether too vague, indefinite and uncertain to constitute valid legislation. As said by Justice Cardozo, speaking for this court in the case of *Zellerbach Paper Co. v. Helvering*, 293 U. S. 172, 55 S. Ct. 127:

> "A statute of uncertain meaning will not readily be made an instrument for so much of hardship and confusion."

(b) *The Act is so Arbitrary, Unfair, Oppressive, Capricious and Unreasonable and so Lacking in Any Safeguards for the Security of Private Rights As to be Void.*

Minnesota, as is true of most of the states, has statutory provisions amply protecting the public from sex offenders and providing for their punishment. Mason's 1927 Minnesota Statutes, Sections 10124 to 10134, 10157, 10194 to 10208, 10534, 10186 to 10193. Minnesota also provides adequate protection against acts of the insane or feeble-minded by the provisions of the Probate Code, Chapter 72, Laws of 1935, sections 173 to 184. There is, therefore, no pressing need for legislation of the type here involved and there is no reason why the matter should not be dealt with after careful study and research.

Even though there were a pressing need for legislation of this type, that fact would not justify a lowering of con-

stitutional barriers and a curtailing of the rights of citizens. This very point was stressed by this court in the recent case of *DeJonge v. State of Oregon*, 299 U. S. 353, 57 S. Ct. 255, where the court held that the right of free speech and peaceable assembly could not be abridged without violating the fundamental principles of liberty and justice which lie at the base of all our political and civil institutions—"principles which the Fourteenth Amendment embodies in the general terms of its due process clause." The court referred to the asserted pressing need for action and held that the greater the importance of safeguarding the community, the more imperative it was that in doing so constitutional rights be preserved, saying:

> "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

And in Schlesinger v. State of Wisconsin, 270 U. S. 230, 46 S. Ct. 260, the court said:

> "Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The state is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

The danger of railroading the innocent to insane asylums has always existed and has been emphasized both in law

books and in fiction. This danger was referred to recently by John H. Wigmore, Dean Emeritus of Northwestern University Law School and former president of the American Institute of Criminal Law and Criminology, in his introduction to Maloy's Nervous and Mental Diseases. In this introduction he refers to fairly recent times when poor people could be spirited away to insane asylums and adds:

> "And even today, in most of our states, the testimony or certificate of any physician, not being a psychiatric expert, may suffice for committal to an institution."

This danger exists under Chapter 369, dealing as it does with the little known subject of psychopathic personalities, where the services of competent and qualified psychiatrists are called for, but entirely ignored—the act expressly providing only for the appointment of "licensed doctors" and not even requiring that they be in active practice.

There can be no question at this day that an act of the legislature, even when passed in the exercise of its police powers, may be so unreasonable and arbitrary as to violate the due process clause of the Fourteenth Amendment. This has been held to be true in rate cases, tax cases and other cases involving only money or property, as illustrated by *Smyth v. Ames*, 169 U. S. 466 and *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362, and certainly it must be true where the rights and liberties of citizens of the United States were involved. The necessity for such protection in the federal Constitution was recognized prior to the adoption of the Fourteenth Amendment. While that amendment was pending and before it had been adopted, John Norton Pomeroy in his work on Constitutional Law, (3rd Edition) Section 237, said of this proposed amendment:

"I consider this amendment to be by far more important than any which has been adopted since the organization of the government, except alone the one abolishing the institution of slavery. It would give the nation complete power to protect its citizens against local injustice and oppression; a power which it does not now adequately possess, but which, beyond all doubt, should be conferred upon it."

In a prior section of this work, Mr. Pomeroy showed how state courts might uphold oppressive state statutes as against the claim that they violated the due process clause of state constitutions. He then said:

"This is a result which is dismaying, and a remedy is needed. Such a remedy is easy, and the question of its adoption is now pending before the people."

In *Cooley's Constitutional Limitations* (8th Edition) page 1228, in speaking of the police power he says:

"It is a matter resting in the discretion of the legislature, and the courts will not interfere therewith *except where the regulations adopted are arbitrary, oppressive or unreasonable.*" (Italics ours.)

In *McGeehee Due Process of Law*, page 306, the author states:

"A general limitation on the exercise of the police power is found in the idea of reasonableness; that is, to be valid a statute must be reasonable and enacted in good faith; for every merely arbitrary and capricious fiat of the legislature is out of place in 'a government of laws and not of men,' and is irreconcilable with the conception of due process of law."

And on page 307 the same author says:

"Ultimately, then, reasonableness must be passed upon by the courts, in the exercise of keeping the legis-

lature within constitutional bounds, and reasonableness may in this sense, and in this sense only, be called a judicial question."

In the article on Constitutional Law in the recently published 16 C. J. S., Section 571, pages 1160-1163, the author discusses the guaranty of due process and the police power of the states as follows:

"Hence, while the guaranty does not interfere with the proper exercise of the police power, and does not prohibit governmental regulation for the public welfare, it of necessity giving way to reasonable police regulations protecting life and property, the due process clause does condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process, which demands that it be for a public purpose, that it be not unreasonable, arbitrary or capricious, which demands only that the law shall not be unreasonable, arbitrary, or capricious, or that the law shall not be unduly oppressive, and that the means selected shall have a real substantial relation to the object sought to be attained."

Statutes involving liberty are subjected to stricter tests than are taxing statutes involving only property. See *Hagar v. Reclamation District*, 111 U. S. 701, 4 S. Ct. 663. Even so, statutes exercising the power of taxation or the power of eminent domain are void as violating the due process of law clause "if found to be arbitrary, oppressive and unjust." *Lent v. Tillson*, 140 U. S. 316, 11 S. Ct. 825.

To be valid under the due process clause an act of the legislature must square with "the established principles of private rights and distributive justice." As said in *Scott v. McNeal*, 154 U. S. 34, 14 S. Ct. 1108:

"The fourteenth article of amendment of the constitution of the United States, after other provisions which do not touch this case, ordains: 'Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through the legislative, its executive, or its judicial authorities. Virginia v. Rives, 100 U. S. 313, 318, 319; Ex Parte Virginia, Id. 339, 346, Neal v. Delaware, 103 U. S. 370, 397. And the first one, as said by Chief Justice Waite in U. S. v. Cruikshank, 92 U. S. 542, 554, repeating the words of Mr. Justice Johnson in Bank v. Okely, 4 Wheat. 235, 244, was intended 'to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'"

In *Old Dearborn D. Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 57 S. Ct. 139, an act of the Illinois legislature was held valid, but the court recognizes that an act of the legislature may result "in a denial of due process" if it is "arbitrary, unfair or wanting in reason."

In Burdick's Law of the American Constitution, Section 266, citing and quoting from *Hurtado v. California*, 110 U. S. 515, 535, the author points out that the police powers of the states must be exercised within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and in the recent case of *Treigle v. Acme Homestead Assn.*, 297 U. S. 189, 57 S. Ct. 408, this court said that the means adopted under the police power must be reasonably adapted to the accomplishment of the end desired "and must not be arbitrary or oppressive."

The rules above referred to are the rules applied by the Supreme Court of Minnesota, as appears from In Re Delinquent Taxes in Polk County, 147 Minn. 344, where the court said:

> "A legislative act may be so arbitrary and oppressive and such an abuse of legislative discretion as to be constitutionally invalid."

Justice Brandeis, in his concurring opinion in *Whitney v. California*, 274 U. S. 357, 47 S. Ct. 641, after stating that it was settled that the due process clause applies to matters of substantive law as well as to matters of procedure, added:

> "Thus all fundamental rights comprised within the term liberty are protected by the federal Constitution from invasion by the states."

Supporting the above authorities, see also:

Southwestern Co. v. Danaher, 238 U. S. 482, 35 S. Ct. 886;

Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55;

Herndon v. Lowry, 301 U. S. 242, 57 S. Ct. 732;

Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14;

Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064.

Whenever rights under the Constitution of the United States are involved, this court, while giving the opinion of the state court "the respectful consideration to which it is entitled" decides for itself the true construction of the statute. As said by this court in *Scott v. McNeal*, supra:

> "In every such case, this court must decide for itself the true construction of the statute."

See also as supporting the above:

Huntington v. Attrill, 146 U. S. 657, 13 S. Ct. 224;

Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 14 S. Ct. 968;

Kansas City Co. v. Botkin, 240 U. S. 227, 36 S. Ct. 261;

McGeehee on Due Process of Law, page 37.

And where rights under the Constitution of the United States are claimed, the right of review by this court cannot be avoided by the state court ignoring the claims or basing its decision on non-federal grounds.

Fiske v. Kansas, 274 U. S. 380, 47 S. Ct. 655;

Ward v. Love County, 253 U. S. 17, 22, 40 S. Ct. 419.

In such cases this court has held that the enforcing of the statute against the objection that it was void under the federal Constitution necessarily affirmed its validity and hence that the judgment of the state court was reviewable under Section 237 of the Judicial Code.

In *Michigan Central Co. v. Mix*, 278 U. S. 492, 49 S. Ct. 207, it was held that denial of a writ of prohibition without any opinion by the highest court of the state was a final decision reviewable by this court.

Construction may not be substituted for legislation, and it is not within the judicial province to read out of the statute the requirement of its words.

United States v. Mo. Pac. Ry. Co., 278 U. S. 269, 49 S. Ct. 133;

Lake Co. v. Rollins, 130 U. S. 662, 670, 9 S. Ct. 651;

Caminetti v. United States, 242 U. S. 470, 37 S. Ct. 192;

Ex Parte Public Nat. Bk., 278 U. S. 101, 49 S. Ct. 43;
United States v. Felt & Tarrant Mfg. Co., 283 U. S. 269, 51 S. Ct. 376;
Rand v. United States, 249 U. S. 503, 510, 39 S. Ct. 359;
Rock Island Co. v. United States, 254 U. S. 141, 143, 41 S. Ct. 55, 56.

The act must stand exactly as written. Explanatory words or words of limitation cannot be supplied by the courts. As said in *United States v. Reese*, 92 U. S. 214:

> "The question, then, to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.
>
> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the States and the people.
>
> "To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

Our research discloses that this Chapter 369 is rare in legislative history. Apparently there have been only two

other acts passed dealing with this problem of sexual psychopathics. The first was Act No. 196 of the Public Acts of 1937 of the Michigan Legislature. This Michigan act was a much saner piece of legislation than Chapter 369. It differed from our act, for instance, in that after the original investigation and commitment for hospitalization, it *required* a re-examination every year into the question of irresponsibility, the provision of the act in that respect being as follows:

> "Provided, however, that such examination, investigation and hearing shall be held at least once every year by the court unless waived by such person in open court."

A proceeding was instituted under this Michigan law and the trial court held it unconstitutional and refused to act under its provisions. The Supreme Court affirmed the action of the trial court in the case of *People v. Frontczak*, 286 Mich. 51, 281 N. W. 534. The ground for the affirmance sufficiently appears from that portion of the opinion quoted below:

> "For an overt act offense the accused has a right to trial by jury of the vicinage, while under this act, for no statutory offense, he is to be tried by a jury of another vicinage, possibly far removed from his former domicile and friends and, if penniless and friendless, and the procedure is not under the criminal code he cannot obtain counsel or have witnesses at public expense. If the procedure is not under the criminal code, then the enactment is no amendment or addition to that code and a mere estray and a nullity. We must class it where we find it placed by its authors, and we find it in the mentioned criminal code chapter relating to judgments and sentences in criminal cases."

"Hospitalization, with curative treatment and measures may be desirable but, until the law makes a sane person amenable to compulsory restraint as a sex deviator, it falls short of due process in merely providing procedure.

"Under this act defendant is under sentence for an overt sex deviation offense and, as a potential like offender, it is sought to keep him in confinement under exercise of the police power. The police power, under such circumstances, is not a civil proceeding comparable to that in cases of insane persons."

On July 6th, 1938, there was approved an act, passed by the Illinois legislature, dealing with criminal, sexual psychopathic persons. It will be found in Jones Illinois Annotated Statutes, Section 37.665 (4). Before the Illinois legislature acted, it had the advice and recommendation of a committee of expert neurologists and psychiatrists appointed by the State's Attorney for Cook County. So far as we know, the validity of this Illinois act has not yet been passed upon. We are informed that there have been no proceedings thereunder, and we are advised by the Attorney General of the State of Illinois that he has never been asked for an opinion upon the act or any phase thereof. The only written reference to this Illinois act that we have found is in an article entitled "Concerning Proposed Legislation for the Commitment of Sex Offenders," appearing in Volume III, John Marshall Law Quarterly 407. The author of this article is William Scott Stewart, at one time connected with the State's Attorney's office of Cook County. In this article he says: "In the matter of the bill under consideration, the proposed remedy would seem worse than the disease," and he expressed the opinion

that the act was void because it violated the due process and equal protection clauses of the constitution, adding:

> "The practical results of the proposed legislation would be to give the prosecution power to lock up any person on suspicion, and the subsequent proceedings would not be what is regarded as a trial but rather an ex parte investigation. As was said in People v. Varcaha, 'the law seeks no unfair advantage over an accused person but is watchful to see that proceedings in which his life or liberty is at stake shall be fairly and impartially conducted.'"

A comparison of this Illinois act and Chapter 369 might be useful:

The Minnesota Act	The Illinois Act
No classification.	Classified under the heading: "Criminal Code," with a subheading: "Commitment and Detention of Sexual Criminals."
The title is:	The title is:
"An act relating to persons having a psychopathic personality." This gives no information whatever as to what class will be dealt with in the body of the act. When this act was introduced not one man in a million could have stated what the body of the act would deal with. Whoever ventured an opinion would have been guessing.	"An act to provide for the commitment and detention of criminal sexual psychopathic persons." This gives considerable information.
Embraces only such persons whose disorder could be traced to a few harmless qualities, common to most men, enumerated in section 1. All others are exempt.	Embraces all persons suffering with the disorder dealt with.
No limit.	The disorder must have existed one year.
No such provision.	Persons must first have been charged with crime.

No such provision. All the court need do is to appoint two "licensed doctors."	The court is required to appoint two qualified psychiatrists to make examination.
No requirement. Anyone holding a license is qualified. That he has had no experience and, in fact, has no qualifications to pass on such matters is no bar. The men appointed may never have heard of a psychopathic personality.	To qualify as a competent psychiatrist, a doctor must be: "A reputable physician licensed to practice in Illinois and who has exclusively limited his professional practice to the diagnosis and treatment of mental and nervous disorders for a period of not less than five years."
No provision for jury trial. Under Mason's 1927 Minnesota Statutes, Sec. 8959 (made a part of the act by reference) if the two doctors (who are not required to know anything about psychopathic personalities) determine that the accused is "dangerous," the court "shall" commit him for life to an insane asylum for the dangerously insane.	A jury "shall be impaneled" to ascertain the ultimate fact in issue.
No provision in the act for commitment to a psychiatric hospital. Commitment is to an insane asylum for the "dangerous insane." Section 8959 Mason's Statutes 1927.	Commitment is to a hospital staffed to adequately treat the disorder.
Commitment is for life. Sec. 8959 Mason's Statutes, 1927.	Commitment is "until recovery."
Authorizes private hearings.	The act contemplates a public hearing before a jury.

The above should be sufficient to demonstrate that, both by what it omits as by what it includes, this Chapter 369 is a legal monstrosity.

Section 2 of Chapter 369 provides that "*all* laws now in force or hereafter enacted relating to insane persons" shall apply "with like force and effect" to persons "having a psychopathic personality", and, also, "to persons *alleged* to have such personality." There is no limitation to procedural matters. Under Section 8959 Mason's 1927 Minnesota Statutes, made a part of Chapter 369 by reference, the Probate Judge and two doctors constitute the board

of examiners. It is not required that any of them know anything about psychopathic personalities. If they determine that the accused is "dangerous to the public", then he "*shall* be committed" to an asylum "for the dangerous insane" for the rest of his life, unless a new board should later find him no longer dangerous. There is no requirement for an examination by a new board at any stated period, and in case anyone was interested enough in the unfortunate to compel such an examination, there is no requirement that this new board should know anything about psychopathic personalities. The phrase in Section 8959 "dangerous to the public" does not differ in any way from the phrase "dangerous to other persons" closing Section 1 of Chapter 369. So far as the accused is concerned, it is perfectly obvious that "the public" are "other persons." Under the provisions of this Chapter 369 a perfectly sane man can be committed for life:

(1) To a lunatic asylum for the "dangerous insane."

(2) As a result of a private hearing.

(3) Without benefit of counsel.

(4) In a county remote from his residence.

(Section 2 authorizes a trial in any county in which the accused "is present".)

(5) Without benefit of a jury trial.

(6) Without the presence of witnesses on his behalf.

(The act, it is true, provides for the issuance of subpoenas, but it makes no provision for the service thereof, or for the payment of witness fees and mileage. Of course, if this were a criminal proceeding, then the accused would be entitled to "compulsory" process for obtaining witnesses without the payment of witness fees or mileage. Const. of

Minn. Art. 1, section 6, section 7017 Mason's 1927 Minn. Statutes. In its opinion the Supreme Court has held that proceedings under this act are not criminal proceedings, so that there is no applicable provision of law for compulsory process or for the payment of witness fees or mileage.)

(7) On examination by two doctors who have no knowledge whatever of psychopathic personalities and who may never have heard the term used. It is not even required that they be in active practice.

(8) Without specialized care at the hands of qualified psychiatrists.

In Minnesota those under guardianship and those who may be non compos mentis or insane are disqualified as voters at any election whether state or national. Minnesota Constitution, Art. 7, Section 2. Insane persons are prohibited from marrying. Mason's 1927 Statutes, Section 8564. They are not competent as witnesses. Mason's 1927 Statutes, Sections 9814, 9819. They are disqualified to sit as grand jurors. Mason's 1927 Statutes, Section 10605. They are disqualified as petit jurors. Mason's 1927 Statutes, Section 9459. Incurable insanity is one of the grounds for divorce. Mason's 1938 Supplement, Section 8585. The insane are incompetent to make wills. Probate Code, Chapter 72, Laws of 1935, Section 34. Insanity is a ground for dissolution of a partnership. Mason's 1927 Statutes, Section 7415. Insane persons are rendered incompetent to sue or to be sued in their own names. Mason's 1927 Statutes, Section 8937. They are practically deprived of the right to contract as their contracts are voidable and people, because of that fact, will not contract with them. Dun-

nell's Digest, Section 4519. When under guardianship insane persons may be removed out of the state by the guardian.

Section 2 of this Chapter 369 provides that:

> "Except as otherwise herein or hereafter provided, all laws now in force or hereafter enacted relating to insane persons, to persons alleged to be insane, and to persons found to be insane, shall apply with like force and effect to persons having a psychopathic personality, to persons *alleged* to have such personality, and to persons found to have such personality, respectively."

From this section 2 it is evident that all the disabilities above outlined are imposed upon psychopathic personalities and even upon those who are merely "alleged" to have such a personality.

From a finding "of the existence of psychopathic personality", section 3 of the act authorizes an appeal to the district court upon compliance with the provisions of Sections 8992-166, 8992-167, 8992-169 and 8992-170 of Mason's 1938 Supplement to the Statutes. Under these sections the accused is required to pay an appeal fee of three dollars to the probate court "to apply on the fee for the return", and file a bond "in such amount" as the probate court may direct to cover all costs and disbursements. After this and "upon payment of the remainder of its fee, if any" the probate court returns to the district court a certified transcript of the judgment appealed from. Section 8992-168 providing that an appeal shall operate to suspend the judgment is eliminated by Chapter 369. There is no provision for bail, and except as to appeals from "the allowance or disallowance of a claim" there is no right to a jury trial. The accused lies in jail until his case is tried. The right to a

jury trial is granted to one who has a claim of $10.00 for fish sold but denied to one whose liberty is at stake. So far as the poor are concerned, the effect of the act is to deny an appeal.

Without further analysis the above should be sufficient to demonstrate that Chapter 369 is too arbitrary, oppressive and unreasonable to constitute valid legislation.

CHAPTER 369 IS VOID AS IT ABRIDGES PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES.

The privileges and immunities clause of the Fourteenth Amendment protects the right of citizens of the United States to vote for national officers; to engage "in lawful commerce, trade or business"; to acquire and contract with relation to property real or personal and to maintain actions. The right to maintain actions, by necessary implication, would embrace the right to testify in support of such actions. All these rights, as shown elsewhere in this brief, are violated by Chapter 369 and the act is void for that reason.

Ward v. Maryland, 12 Wall. 418, 430;
Ex Parte Yarbrough, 110 U. S. 651, 4 S. Ct. 152;
Wiley v. Sinkler, 179 U. S. 58, 21 S. Ct. 17;
Colgate v. Harvey, 296 U. S. 404, 56 S. Ct. 252.

That appellant is a citizen of the state that passed the act does not remove him from the protection of this clause of the Fourteenth Amendment. As said by this court in *Colgate v. Harvey*, supra:

"The result is that whatever latitude may be thought to exist in respect of state power under the Fourth Article, a state cannot, under the Fourteenth Amendment, abridge the privileges of a citizen of the United States, albeit he is at the same time a resident of the state which undertakes to do so. This is pointed out by Mr. Justice Bradley in the Slaughter House Case, Fed. Cas. No. 8,408, 1 Woods 21, 28:

'The 'privileges and immunities' secured by the original constitution, were only such as each state gave to its own citizens. Each was prohibited from discriminating in favor of its own citizens, and against the citizens of other states.

'But the fourteenth amendment prohibits any state from abridging the privileges or immunities of the citizens of the United States, whether its own citizens or any others. It not merely requires equality of privileges; but it demands that the privileges and immunities of all citizens shall be absolutely unabridged, unimpaired.'"

CONCLUSION.

Chapter 369 clearly violates every guaranty of Section 1 of the Fourteenth Amendment and should be adjudged void.

Respectfully submitted,

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